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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 414

THOMAS W. WHITE, COLLECTOR OF INTERNAL REVENUE, *Petitioner.*

vs.

HOOD RUBBER COMPANY.

BRIEF OF HOOD RUBBER COMPANY IN ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Attorney for Hood Rubber Company.

HAROLD C. HASKELL,
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H. STANLEY HINRICHS,
Of Counsel.

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Hood Rubber Company, the Respondent in the above-entitled cause, respectfully submits that the petition of the Solicitor General on behalf of Thomas W. White, Collector of Internal Revenue, should be denied.

STATEMENT OF ADDITIONAL FACTS

It is necessary to call the attention of the Court to the omission from the petition of one fact which the

Respondent and the Circuit Court have considered to have a significant bearing upon the case.

After the Respondent had filed on March 14, 1919, its return on Form 1031-T, and had paid one-quarter of the tax estimated thereon (this payment being required by the Commissioner), but before the expiration of the time for filing the completed return, and before the completed return was filed, Respondent received from the Collector of Internal Revenue a demand for the payment of $75,000, the same being the second installment of taxes, one-quarter thereof shown to be due by the return made on Form 1031-T. On June 16, 1919, the Respondent paid this sum in consequence of said demand. (See Paragraph 3 of the Agreed Statement of Facts, R23.)

ADDITIONAL STATUTES INVOLVED

The Respondent feels obliged to call the Court's attention to the omission of the Solicitor General to include in the statutes cited by him Section 250 (a) of the Revenue Act of 1918. The Circuit Court of Appeals refers specifically to this section as one of the bases for its finding in favor of the Respondent. This section reads as follows:

> "Sec. 250 (a). That except as otherwise provided in this section and sections 221 and 237, the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax. The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the

ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. In any case in which the time for the payment of any installment is at the request of the taxpayer thus postponed, there shall be added as part of such installment interest thereon at the rate of one-half of one per centum per month from the time it would have been due if no extension had been granted, until paid. If any installment is not paid when due, the whole amount of the tax unpaid shall become due and payable upon notice and demand by the Collector.

"The tax may at the option of the taxpayer be paid in a single payment instead of in installments, in which case the total amount shall be paid on or before the time fixed by law for filing the return, or, where an extension of time for filing the return has been granted, on or before the expiration of the period of such extension."

QUESTIONS PRESENTED

On Page 6 of the Solicitor General's Petition the two issues are set forth, phrased in most general terms. The Respondent believes that the issues there framed do not present the questions in their exact and specific form, and therefore would rephrase them as follows:

(1) Whether the statute of limitations for the assessment and collection of taxes, provided by Section 250 (d) of the Revenue Act of 1918, and of the Revenue Act of 1921, was set in motion by

the filing of an income tax return on Form 1031-T, that being the form prescribed by the Commissioner of Internal Revenue for use at the time it was filed.

(2) Whether, assuming assessment of an additional tax for the year 1918 to have been timely made within the provisions of an instrument in writing signed by the Commissioner and the taxpayer extending the time for the determination, assessment and collection of the taxes in question for one year after the expiration of the statutory period of limitation, the Revenue Act of 1924, enacted subsequent to the execution of this instrument, but prior to the expiration of the year's period therein mentioned, operated to enlarge the period within which collection of said tax could legally be made.

ARGUMENT

POINT I

The Statute of Limitations provided by Section 250 (d) of the Revenue Act of 1918, and of the Revenue Act of 1921, was set in motion by the filing by Respondent of its income tax return on Form 1031-T.

The Respondent filed on March 14, 1919, a return on Form 1031-T. This form was furnished by the Commissioner of Internal Revenue and was the only form at that time available to taxpayers for making the return prescribed by law.

It is apparent from an analysis of Section 227 (a), 239 (a) and 250 (a) of the Revenue Act of 1918 that a return must be filed on or before March 15th in each year, unless an extension of time is authorized by the Commissioner. Wherever the word "return" is referred to in these sections it has a definite article and

a single subject and, therefore, can mean only one return, namely, the return to be filed on or before March 15, which return sets in motion the Statute of Limitations.

It is urged on behalf of the Petitioner that since this return on Form 1031-T did not state specifically the items of gross income and the deductions and credits allowed by the Act, but merely requested an extension of time, it cannot be *the* return contemplated by the Act, and that the completed return (filed by the Respondent on July 14, 1919) was the return which set in motion the Statute of Limitations.

While the law requires a return to be filed on March 15 in each year it does not require that the paper on which this return is made shall contain within its four corners all items of "gross income deductions and credits," and Respondent on that day initiated a proceeding by which the Commissioner could secure at any time the said items. Even if it were not a completed paper, still it was the return then required by the Commissioner.

It is common knowledge that during the period from January 1st to July 14th, 1919, the Commissioner of Internal Revenue issued, through the public press and otherwise, several notices with respect to the filing of returns by the taxpayer. The language of these notices revealed that the Commissioner himself contemplated the filing of a return by the taxpayer on or before March 15th to be later amended or revised or completed. The law is clear that where an original return is filed and later by a subsequent return is amended, voluntarily or upon requirement by the law,

the tolling of the Statute of Limitations commences with the filing of the original return.

It is urged on behalf of the Petitioner that this return on Form 1031-T was merely a request for an extension of time by the taxpayer for the filing of a definite return.

Section 227 (a) authorized the Commissioner to grant a reasonable extension of time for filing returns whenever in his judgment good cause exists. But this authority to grant an extension is qualified in a later section of the same Act; namely, Section 250 (a) which provided generally for the payment of the tax in installments, and then specifically dealt with the situation in regard to payment where an extension of time has been granted, as follows:

> "Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installment shall not be postponed unless the Commissioner so provides in granting the extension."

In the instant case not only was the Respondent compelled to pay one-quarter of the tax estimated to be due by the return on Form 1031-T, but also before the time for filing a completed return had expired it was required to pay an additional installment of like amount.

But section 250 (a) is clear that in the event of an extension of time the Commissioner has no option but to extend also the time for payment of the first installment of the tax. From the Commissioner's point of

view the law authorized him to do one of two things only; either to require and receive a *return* on or before March 15th or *unconditionally* to grant an extension of time for the filing of a return. If he elects the latter he has no authority to require the filing of any document whatever (except a mere request for an extension of time) nor to demand payment of any part of the tax until the period of the extension which he has granted has elapsed.

Since it is to be presumed that where an official has acted his act has been legally done, there is no alternative but to hold that the return on Form 1031-T could not have been a request for an extension of time but must have been *the return* contemplated by law.

The problem presented in this petition is very carefully analyzed in a thoroughly reasoned and logical opinion in the court below. In the very week in which it was argued in the circuit court the United States District Court for the eastern district of South Carolina rendered in *Brandon Corporation vs. Jones,* 33 Fed. 2nd, 969, a most carefully and elaborately reasoned opinion. The holding of the Circuit Court of Appeals of the 9th circuit in *Rasmussen vs. Brownfield Canty Carpet Company,* 31 Fed. 2nd, 89 also supports the decision of the Circuit Court for the first circuit. In the latter decision the Circuit Court likens the situation to the case of an amended return and holds that the tentative return must be considered to start the period of limitation.

Opposed to these three carefully reasoned cases is only the decision of the court in the *Florsheim Brothers Dry Goods Company vs. U. S.,* 29 Fed. 2nd, 895. In

that case the opinion, without giving any reason at all for the decision, merely states a conclusion that the running of the statute commences from the date of the filing of the completed return.

The Respondent is aware that there are several Board of Tax Appeals cases which support the contentions advanced by the Solicitor General in his Petition. The Board of Tax Appeals is, however, an administrative and not a judicial body, and it is submitted that not only those cases but the Florsheim case are answered by the reasoning of the Circuit Courts in this and the Rasmussen case and the District Court in the Brandon case.

The Respondent respectfully submits that the only logical interpretation of those sections of the Revenue laws of 1918 and 1921 which deal with the filing of the return points to the tentative return filed on March 14, 1919, as *the return* contemplated. It is further respectfully submitted that the weight of authority supports this contention.

Would not it be as reasonable for the court to hold that where a suit had been filed and the defendant demanded a bill of particulars, the bill of particulars would start the running of the statute?

Point II

Even if it be assumed that the additional tax in question was timely assessed, the Revenue Act of 1924 cannot be held to enlarge the period provided by law and by the waiver agreement of January 26, 1924, between the Commissioner and the Respondent within which the tax could legally have been collected.

On January 26, 1924, the Respondent and the Commissioner of Internal Revenue entered into an agreement (the full text of which is set forth on Page 2 of the Solicitor General's Petition) wherein it was agreed that the period of limitation for the determination, assessment *and collection* of taxes for the year 1918 be extended for one year after the expiration of the statutory period of limitation provided by law.

By Section 250 (d) of the Revenue Act of 1918 and of the Revenue Act of 1921 the statutory period of limitation upon assessment and collection of the tax expired five years after the date of the filing of the return.

Had it not been for this agreement, the period for assessment and collection of the taxes would have expired on March 14, 1924, or July 14, 1924, according to the view taken on the question whether the filing of the tentative return or the completed return started the tolling of the Statute of Limitations. The agreement extended the period for one year. Assessment of the tax in question was made on March 18, 1925, and collection was enforced by distraint on December 15, 1926.

It is respectfully submitted that from and after the date of this agreement the respective rights of the Respondent and the Petitioner were limited by its terms. The agreement was one which the Commissioner was authorized by law to make, and it was entered into in good faith by both parties.

Respondent contends that the term within which this additional tax could legally be assessed and col-

lected was limited either by the Revenue Act of 1921, the law then in force, or by the terms of this written agreement. If we assume the latter, although the assessment was timely made (conceding for the purpose of argument that the filing of the completed return started the running of the Statute), collection was not enforced until long after the period of limitation created by the agreement had expired.

On the other hand, if this agreement is not to control, then the assessment was not timely made, for the last date upon which assessment could be made under any of the Revenue Acts, and under a construction of the facts most favorable to the Petitioner on the first issue, was July 14, 1924.

Either there is no virtue at all in the agreement, or else it must be taken to mean what it says. The Petitioner cannot be allowed to blow hot and cold at the same time and say that the terms of the agreement are valid with respect to the extension of time for assessment but that the limitation on the time for collection is meaningless.

It has been suggested, on behalf of the Petitioner, that although the agreement of January 26, 1924, constituted a valid and binding agreement between the parties, the Revenue Act of 1924, subsequently enacted, modified the terms of this contract so far as the obligation of the Commissioner was concerned.

The Respondent submits, in answer to this contention, that regardless of whether or not Congress had the power to alter this contract, there is no language in the Revenue Act of 1924, which expressly modifies

it. An entirely analogous situation is presented in the case of *Chicago & Northwestern Railway v. United States* 104 U. S. 660 wherein it was held that Congress could not vary the terms of a contract to which the Government was a party, so that while the Government's rights and remedies remain unchanged, new obligations were imposed upon the other contracting party.

In spite of the dilemma in which the Petitioner is placed by the agreement of January 26, 1924, it has been urged on his behalf that since the time for assessment of the tax in question had not expired when the Revenue Act of 1924 was enacted, that law imposes the limitation upon assessment and collection of taxes, replacing all earlier laws and agreements.

Such a construction necessarily gives a retroactive effect to the provisions of this Act which cannot be gathered from its language. On the other hand, it is apparent from a reading of the pertinent provisions of the Act that Congress intended the 1924 Act to be a point of departure from the earlier laws, leaving whatever existed under the earlier laws to be worked out in accordance with their provisions, and framing a new act for the future.

This interpretation is supported by the case of *United States v. Whyel (C. C. A. 3rd)* 28 Fed. (2nd) 30. The opinion in that case quotes the proceedings before the Committee of Finance of the Senate which had under consideration the Revenue Act of 1924 before it became law which plainly indicated the understand-

ing of Congress that this Act was not to be retroactive.

Other cases which point the same way are:

Russell v. United States 278 U. S. 1.

Rasmussen v. Brownfield-Canty Carpet Company—supra.

United States v. Cabot 5 Am. Fed. Tax. Rep. 6172.

The only case which is squarely contra is *Florsheim Bros. Dry Goods Company v. United States, supra.* The Solicitor General in his Petition has cited several other cases in support of his argument on this issue. It is submitted, however, that the cases which he cites involve later Revenue Acts, and that the question here in issue is so narrow and specific that no assistance is to be derived from the reasoning in such cases.

As shown above, there are two distinct and separate issues in this case. If the Respondent prevails upon either of these issues, it is entitled to judgment. The District Court, in finding for the Respondent upon one of these issues, considered it unnecessary to analyze the other issue. In the Circuit Court of Appeals, this other issue was examined, and resolved in favor of the Respondent, the Court not discussing the merits of the issue which had been passed upon by the District Court.

The result of this is that the whole case, and not merely one feature of it, has already been submitted to judicial analysis. There are, in effect, two opinions, each on a different issue, both in favor of the Respondent.

It is respectfully submitted that this fact goes a long way toward dispelling the possibility that error may exist in the decisions below because of a conflicting decision in the Circuit Court of Appeals for the Fifth Circuit. But if any doubt still exists as to which decisions, those of the Courts of the First Circuit on the one hand, or those of the Courts of the Fifth Circuit on the other hand, set forth the true rule of law, a careful reading of the opinions should leave no doubt whatever, but that the result arrived at by the former was reached after careful and exhaustive analysis of the facts and the law, whereas the Fifth Circuit Court considered the problem less thoroughly.

The Solicitor General remarks in his Petition that the instant case is of general importance. The Respondent takes issue with him on this point. The question involved is the application of several Internal Revenue Acts (all of which have been long since extensively modified), to a unique set of facts which, under existing laws and regulations could not reoccur. The few general principles of law which have been invoked to aid in solving the problem are well known and, as principles of law, not in the least debatable. A more narrow or more technical question than that presented by the case at bar could scarcely be conceived, wherefore, it is respectfully submitted that its authoritative determination by this Court would not create precedent to guide taxpayers and the Treasury Department in the future, but would merely endorse the reasoning of one or the other of the Courts which have rendered conflicting decisions.

CONCLUSION

In view of the foregoing it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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